

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH V. LAGANA,
Plaintiff,
v.
SAN FRANCISCO POLICE DEPT,
Defendant.

No. C 08-03392 CW

ORDER GRANTING, IN
PART, DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND
REMANDING STATE
CLAIMS

This case arises out of several incidents involving Plaintiff and officers of the San Francisco Police Department. Originally, Plaintiff filed this case in state court by filling out a form complaint and checking boxes for causes of action alleging general negligence, intentional tort, assault, stalking, and violation of the First Amendment. Defendant removed based upon Plaintiff's First Amendment claim. Plaintiff originally named as Defendants the San Francisco Police Department (SFPD) and the City and County of San Francisco (CCSF). In its August 27, 2008 Order Granting Defendant's Motion to Dismiss with Leave to Amend, the Court explained that SFPD is an agency of CCSF and CCSF is the entity that may be sued. On October 6, 2008, Plaintiff filed a Third Amended Complaint (TAC) alleging violations of the First, Fourth and Fourteenth Amendments, violations of three federal statutes and many state law claims. CCSF now moves for summary judgment on all of Plaintiff's claims. Plaintiff has filed an opposition. CCSF

1 has not filed a reply. The motion was taken under submission on
2 the papers. Having considered the papers filed by the parties, the
3 Court grants, in part, Defendant's motion for summary judgment and
4 remands the state law claims.

5 BACKGROUND

6 The first incident about which Plaintiff complains occurred on
7 May 15, 2008. According to Plaintiff, on that day, he was in front
8 of the Ross Store located on Market and Fourth Streets in downtown
9 San Francisco protesting the Pleasanton Police Department,
10 President Bush and the fact that he lived in a "police state."
11 Officer Leonard Cueba told Plaintiff to leave the area in front of
12 the Ross Store and to cease his protesting. When Plaintiff
13 refused, Officer Cueba grabbed Plaintiff by his sweater, causing
14 the sweater and his undershirt to rip. Plaintiff states that,
15 contrary to Officer Cueba's version of this event, he never was
16 inside the Ross Store.

17 According to Officer Cueba, on May 15, he was working as
18 additional security inside the Ross Store pursuant to a contract
19 between Ross and CCSF. Plaintiff was yelling about suing one or
20 more police departments and was taking photographs of Ross
21 employees. Officer Cueba was asked by the store manager to escort
22 Plaintiff out of the store. When Plaintiff saw Officer Cueba, he
23 left the store. About fifteen minutes later, Plaintiff came back
24 inside the store yelling about suing the police and taking
25 photographs of Ross employees. Plaintiff was frightening the Ross
26 employees. Officer Cueba asked Plaintiff to leave the store, and
27 when he refused, Officer Cueba grabbed him by the arm and walked
28 him out of the store. Officer Cueba states that he did not rip

1 Plaintiff's sweater.

2 The second incident took place on June 1, 2008, at
3 approximately 3:45 a.m., when San Francisco Police Officers Joseph
4 Toomey and Daniel Reyes arrested Plaintiff for being intoxicated in
5 public. According to Officer Toomey, he and his partner responded
6 to a call that Plaintiff was yelling and harassing customers on the
7 sidewalk outside a nightclub at 1015 Folsom Street. When they
8 arrived, they saw that Plaintiff was aggressively and
9 inappropriately harassing club patrons on the sidewalk. They
10 observed that Plaintiff smelled of alcohol, his eyes were bloodshot
11 and his eyelids drooped. They also observed that Plaintiff was
12 mumbling and had an unsteady gait. According to Plaintiff, he was
13 protesting and promoting a nightclub event, he was not intoxicated
14 or rude and did not belittle any club patrons.

15 The third incident took place on June 1, 2008, at
16 approximately 8:00 p.m. Officer Raymond Kane and his partner,
17 Officer Elias, responded to a call from the Palomar Hotel reporting
18 a citizen's arrest by the hotel doorman. Officer Kane states that,
19 according to the doorman, Plaintiff flicked a lit cigarette in the
20 doorman's face and punched him. The doorman signed a citizen's
21 arrest form for Plaintiff's arrest and the officers arrested him.

22 According to Plaintiff, the doorman approached him while he
23 was protesting and told him to "shut up and leave." Plaintiff
24 ignored him and went on protesting. The doorman left, but
25 Plaintiff thought that he should get the doorman's name to report
26 him to the police. Plaintiff approached the doorman and asked him
27 for his name. The doorman responded by walking over to Plaintiff
28 and taking a fighting stance. Plaintiff flicked his cigarette into

1 the street. The doorman threw a punch and Plaintiff punched back
2 in self-defense. The doorman tackled Plaintiff and held him on the
3 ground until the police arrived. According to Plaintiff, the
4 doorman started the incident and the police should not have
5 arrested him.

6 The fourth incident occurred on June 4, 2008, just after
7 Plaintiff was released from incarceration based on the above-
8 mentioned arrest. According to Plaintiff, he was walking down the
9 street when Officer Toomey drove by and asked him what he was doing
10 out of jail. Plaintiff replied that the district attorney had
11 dropped the charges against him. Plaintiff stopped to converse
12 with the doorman of a nightclub at the corner of Sixth and Mission
13 Streets. Officer Toomey came by again, handcuffed Plaintiff and
14 searched him for fifteen minutes before releasing him. According
15 to Officer Toomey, on June 4, 2008, he responded to a call about a
16 public nuisance outside the nightclub at Sixth and Mission Streets.
17 When he arrived, nightclub personnel identified Plaintiff as the
18 person making the disturbance by yelling and harassing nightclub
19 customers. Officer Toomey and his partner conducted a brief pat-
20 down search of Plaintiff which only took one minute and Plaintiff
21 was released without arrest.

22 The fifth incident took place on June 13, 2008. According to
23 Officer Larry Bertrand, on that day, he and his partner responded
24 to a call from SFPD dispatch that a man was threatening a delivery
25 person outside a Subway sandwich store on Mission Street. Officers
26 Frost and Lucas also responded to the call. When Officer Bertrand
27 and his partner arrived, Plaintiff had already been detained in
28 handcuffs by Officers Frost and Lucas. Plaintiff was yelling and

1 screaming obscenities and racial epithets. The delivery person did
2 not want to press charges. Because Plaintiff appeared to be a
3 danger to himself and others, Officer Bertrand transported him to
4 the Psychological Emergency Services ward of San Francisco General
5 Hospital for observation. According to Plaintiff, he never
6 threatened anyone, he never met the unknown victim and Officers
7 Frost, Lucas and Bertrand are part of a conspiracy to arrest him
8 falsely. He also states that, sometime during the arrest, Officer
9 Bertrand slammed him to the ground, choked him and kneed him.
10 Officer Bertrand states that at no time did he use force against
11 Plaintiff.

12 According to Officer Bertrand, a few weeks after this
13 incident, he observed Plaintiff yelling loudly and screaming at
14 people near the Powell and Market Street cable car turnaround.
15 Because Plaintiff was acting erratically and aggressively, Officer
16 Bertrand conducted a brief pat down search of Plaintiff for
17 weapons. The search lasted no more than one minute. According to
18 Plaintiff, Officer Bertrand returned to harass him and unlawfully
19 searched and detained him.

20 A sixth incident occurred on July 14, 2008, when Plaintiff was
21 arrested by Officers Robert Forneris and Paul Morgado for public
22 drunkenness. According to Officer Forneris, he observed Plaintiff
23 walking in the roadway shouting, "Fuck the police," and talking
24 about a conspiracy against him among CCSF, the Mayor and SFPD Chief
25 Fong. Officer Forneris declares that he smelled alcohol on
26 Plaintiff's breath and Plaintiff admitted drinking a "couple of
27 shots of wine." According to Plaintiff, he was not drunk, and
28 yelled only once, "Fuck the police! Stop following me!"

1 Plaintiff states that the district attorney never filed
2 charges against him pursuant to any of his arrests. Defendant does
3 not dispute this.

4 LEGAL STANDARD

5 Summary judgment is properly granted when no genuine and
6 disputed issues of material fact remain, and when, viewing the
7 evidence most favorably to the non-moving party, the movant is
8 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
9 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
10 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
11 1987).

12 The moving party bears the burden of showing that there is no
13 material factual dispute. Therefore, the court must regard as true
14 the opposing party's evidence, if it is supported by affidavits or
15 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
16 815 F.2d at 1289. The court must draw all reasonable inferences in
17 favor of the party against whom summary judgment is sought.
18 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
19 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
20 1551, 1558 (9th Cir. 1991).

21 Material facts which would preclude entry of summary judgment
22 are those which, under applicable substantive law, may affect the
23 outcome of the case. The substantive law will identify which facts
24 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
25 (1986).

26 Where the moving party does not bear the burden of proof on an
27 issue at trial, the moving party may discharge its burden of
28 production by either of two methods:

1 The moving party may produce evidence negating an
2 essential element of the nonmoving party's case, or,
3 after suitable discovery, the moving party may show that
4 the nonmoving party does not have enough evidence of an
5 essential element of its claim or defense to carry its
6 ultimate burden of persuasion at trial.

7 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
8 1099, 1106 (9th Cir. 2000).

9 If the moving party discharges its burden by showing an
10 absence of evidence to support an essential element of a claim or
11 defense, it is not required to produce evidence showing the absence
12 of a material fact on such issues, or to support its motion with
13 evidence negating the non-moving party's claim. Id.; see also
14 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
15 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
16 moving party shows an absence of evidence to support the non-moving
17 party's case, the burden then shifts to the non-moving party to
18 produce "specific evidence, through affidavits or admissible
19 discovery material, to show that the dispute exists." Bhan, 929
20 F.2d at 1409.

21 If the moving party discharges its burden by negating an
22 essential element of the non-moving party's claim or defense, it
23 must produce affirmative evidence of such negation. Nissan, 210
24 F.3d at 1105. If the moving party produces such evidence, the
25 burden then shifts to the non-moving party to produce specific
26 evidence to show that a dispute of material fact exists. Id.

27 DISCUSSION

28 I. Civil Rights Claims

Plaintiff alleges that CCSF violated his rights under the
First, Fourth and Fourteenth Amendments to the Constitution.

1 Title 42 U.S.C. § 1983 "provides a cause of action for the
2 'deprivation of any rights, privileges, or immunities secured by
3 the Constitution and laws' of the United States." Wilder v.
4 Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C.
5 § 1983). Section 1983 is not itself a source of substantive
6 rights, but merely provides a method for vindicating federal rights
7 elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94
8 (1989). Here, Plaintiff sues a municipality, CCSF. To prevail on
9 a claim for violation of constitutional rights under 42 U.S.C.
10 § 1983 against a municipality, a plaintiff must show: (1) that he
11 or she suffered a deprivation of a constitutionally protected
12 interest; and (2) that the deprivation was caused by an official
13 policy, custom or usage of the municipality. Monell v. New York
14 Dep't of Social Services, 436 U.S. 658, 690-91 (1978); City of
15 Canton v. Harris, 489 U.S. 378, 390-91 (1989). Municipal
16 liability based on unconstitutional acts of municipal employees
17 cannot be established on the basis of respondeat superior, but
18 rather requires proof that the harm was caused by the policy or
19 custom of the municipality. Monell, 436 U.S. at 694. A plaintiff
20 must show that "the municipality itself causes the constitutional
21 violation through 'execution of a government's policy or custom,
22 whether made by its lawmakers or by those whose edicts or acts may
23 fairly be said to represent official policy.'" Ulrich v. City &
24 County of San Francisco, 308 F.3d 968, 984 (9th Cir. 2002) (quoting
25 Monell, 436 U.S. at 694)). Although the liability of
26 municipalities does not depend upon the liability of individual
27 officers, it is contingent on a violation of constitutional rights.
28 Scott v. Henrich, 39 F.3d 912, 916 (9th Cir. 1994). The inadequacy

1 of police training can form the basis for municipal liability "only
2 where the failure to train amounts to deliberate indifference to
3 the rights of the persons with whom the police come into contact."
4 City of Canton, 489 U.S. at 388.

5 Defendant argues that it is entitled to summary judgment on
6 Plaintiff's Monell claims because he has failed to provide any
7 evidence that Defendant has or had a policy or custom that caused
8 his civil rights to be violated. In his opposition, Plaintiff
9 argues that the motion must be denied because the only evidence
10 offered by Defendant is the testimony of the officers and there is
11 no evidence that Plaintiff was drunk on the occasions he was
12 arrested for being intoxicated.

13 There are disputes of fact regarding the incidents upon which
14 Plaintiff bases his claims against Defendant. However, even if the
15 disputes of fact were resolved in Plaintiff's favor, and, even if
16 that led to the conclusion that Plaintiff's constitutional rights
17 were violated, Plaintiff still must submit evidence to establish
18 that Defendant caused the constitutional violations through
19 enforcement of a policy or custom or its failure to train its
20 police officers. Plaintiff has failed to submit any such evidence.
21 In his TAC, Plaintiff states that there is a lengthy track record
22 of SFPD officers abusing their "use-of-force ability" and
23 "arresting the public in a wanton fashion" and that it is a matter
24 of custom and practice for officers of the SFPD to use excessive
25 force and to search citizens unlawfully. TAC at ¶¶ 55, 121-25. He
26 also alleges that CCSF ignores the officers' misconduct because
27 SFPD's ranks are low, there is an insufficient number of available
28 applicants and CCSF is desperate to retain the officers it employs.

1 TAC at ¶ 123. Plaintiff's conclusory allegations are insufficient
2 to establish that Defendant has a policy or custom that causes its
3 police officers to engage in unconstitutional acts or that
4 Defendant fails to train its officers properly.

5 Plaintiff also argues that the motion must be denied because
6 Defendant does not raise a defense to Plaintiff's First and
7 Fourteenth Amendment claims. Plaintiff's argument is not well-
8 taken. As explained above, whether constitutional violations
9 occurred is not the question in this motion. Rather, Plaintiff
10 must provide evidence that the constitutional violations were
11 caused by Defendant's policy, custom or failure to train its
12 officers. Because Plaintiff has failed to submit such evidence,
13 Defendant's motion for summary judgment on Plaintiff's Monell
14 claims is granted.

15 II. Other Federal Claims

16 In addition to claims under § 1983, Plaintiff alleges three
17 other federal claims: that Defendant violated 18 U.S.C. §§ 241 and
18 242 and 42 U.S.C. § 1985.

19 Sections 241 and 242 are criminal statutes. Plaintiff, as a
20 private citizen, may not bring a criminal action against Defendant.

21 Section 1985 prohibits civil rights conspiracies. To state a
22 claim under § 1985, a plaintiff must allege: (1) the purpose of the
23 conspiracy was to deprive the plaintiff of equal protection or to
24 obstruct the course of justice in the state; (2) the defendant
25 intended to discriminate against the plaintiff; (3) the defendant
26 acted under color of state law; and (4) the acts done in
27 furtherance of the conspiracy resulted in an injury to the
28 plaintiff's person or property. Sykes v. California Dep't of Motor

1 Vehicles, 497 F.2d 197, 200 (9th Cir. 1974). The second of these
2 four elements requires that, in addition to identifying a legally
3 protected right, a plaintiff must demonstrate a deprivation of that
4 right motivated by "some racial, or perhaps otherwise class-based,
5 invidiously discriminatory animus behind the conspirators' action."
6 Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992).
7 Plaintiff fails to provide any evidence that Defendant
8 discriminated against him or intended to discriminate against him
9 based on a racial or class-based animus.

10 Thus, Defendant's motion for summary judgment on these claims
11 is granted.

12 III. State Claims

13 Plaintiff alleges Defendant violated many state laws and
14 provisions of the state constitution. Title 28 U.S.C. § 1367(c)(2)
15 authorizes district courts to decline to exercise supplemental
16 jurisdiction over a state law claim if "the claim substantially
17 predominates over the claim or claims over which the district court
18 has original jurisdiction." Here, the main federal claim is that
19 of civil rights violations based on Monell. The lawsuit primarily
20 concerns state law violations. In fact, in Plaintiff's original
21 complaint filed in state court, the only mention of a federal claim
22 was a reference to the First Amendment.

23 In determining whether to decline to exercise supplemental
24 jurisdiction, the Court should consider whether remanding the rest
25 of the case to state court will accommodate the values of "economy,
26 convenience, fairness, and comity." Executive Software North
27 America, Inc. v. United States District Court, 24 F.3d 1545, 1557
28 (9th Cir. 1994). Although Defendant removed this case very soon

1 after it was filed in state court, because state claims
2 predominate, the values of economy, convenience, fairness, and
3 comity favor remanding the state law claims.

4 IV. Request to Amend Opposition

5 Plaintiff requests that he be allowed to amend his opposition
6 because he was prejudiced by the fact that he was given only ten
7 days to prepare it and he should be allowed thirty-five calendar
8 days. Civil Local Rule 7 governs the filing of motions and
9 oppositions. A motion must be filed, served and noticed for
10 hearing not less than thirty-five days after service of the motion.
11 Civil L.R. 7-2(a). Any opposition to the motion must be served and
12 filed not less than twenty-one days before the hearing date. Civil
13 L.R. 7-3(a). Thus, all oppositions to motions must be filed within
14 two weeks after service of the motion, not thirty-five days as
15 Plaintiff argues. Plaintiff's request to file an amended
16 opposition is denied.

17 CONCLUSION

18 For the foregoing reasons, Defendant's motion for summary
19 judgment is granted on Plaintiff's federal claims. Plaintiff's
20 request to amend his opposition is denied. Plaintiff's state law
21 claims are remanded to the Superior Court of the County of San
22 Francisco.

23 IT IS SO ORDERED.

24
25 Dated: 10/14/09



26 CLAUDIA WILKEN
27 United States District Judge
28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH LAGANA,

Plaintiff,

v.

SAN FRANCISCO POLICE DEPT et al,

Defendant.

Case Number: CV08-03392 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 14, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Joseph Victor Lagana
3064 East 15th St.
Oakland, CA 94601

Dated: October 14, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California